Supreme Court, U.S.
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No. 10-506

IN THE SUPREME COURT OF THE UNITED STATES

JOSEFINA CRUZ

Petitioner,

V.

NEW YORK CITY DEPARTMENT OF EDUCATION, *et al.*,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Introduction:

This case presents a unique opportunity for the Court to establish standards relating to the general principles of "Exhaustion of Remedies" so that claimants who have an obligation to "exhaust remedies" under administrative statutes are treated equally and according to an equitable standard.

At present, exhaustion of remedies standards for discrimination or tort claims by public school teachers, such as the Petitioner, do not permit flexible application, amendment to claims or equitable interpretations when determining whether or not to permit civil claims in cases involving ongoing torts. There is disagreement between the Circuits on this issue.

Yet, exhaustion of remedies standards for discrimination or tort claims by prisoners enjoy flexible application, amendments to claims and equitable interpretations when determining whether or not to a prisoner's civil claims should be precluded due to alleged lack of exhaustion of remedies. See *Jones v. Bock* (No. 05-7058, Cert. Granted: March 6, 2006).

Petitioner prays that the Court consider the inequities, as well as the different and inequitable outcomes, that result from the lack of standards to govern all issues where "exhaustion of remedies" is raised as a procedural defense to a valid and timely claim involving ongoing allegations of discrimination and ongoing tort.

Questions Presented for Review:

1. Is the principle of "exhaustion of remedies" a procedural, jurisdictional or substantive principle?
2. Should the principle of "exhaustion of remedies"
    a. Be strictly construed so as to preclude a plaintiff from pursuing claims related to an

ongoing and continuing pattern of discrimination?

b. Be applied equally to all complaints based upon Federal statutory actions?

c. Related to discrimination and other tort claims by public school teachers, be applied more strictly than the "exhaustion of remedies" standards that are applied to other claims, including those of Federal prisoners?

d. Preclude a plaintiff from making claims based upon a timely filed EEOC complaint for ongoing wrongdoing in a civil case?

3. In the context of ongoing torts, should the allegations and facts set forth in an EEOC complaint preclude a Court from considering post-EEOC complaint conduct or other wrongdoing by an employer?

LIST OF PARTIES

Petitioner is JOSEFINA CRUZ, who was the Plaintiff-Appellant in the court of appeals below.

There were other plaintiffs in the original lawsuit, as follows: DIANA HRISINKO, ANDREA SHAPIRO, DIANA LEE FRIEDLINE, ISMAEL DIAZ, ANTHONY FERRARO, ELAINE JACKSON, MIDGE MARONI, DAVID MCMULLEN, RAM NARINE, GERALDINE WHITTINGTON, FITZROY KINGTON, GLORIA CHAVEZ, and ERICA WEINGAST.

Respondents are THE NEW YORK CITY BOARD OF EDUCATION, GRAPHIC COMMUNICATION ARTS HIGH SCHOOL, JEROD RESNICK, in his individual capacity; DOMINIC CIPOLLONE, EDWARD DEMEO, JACQUELINE KENNEDY ONASSIS HIGH SCHOOL, M.S. 219, ERIC BRAND, in his individual capacity; JUDITH SILVERMAN, in her individual capacity.

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEFINA CRUZ,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Josefina Cruz, pursuant to Section ---, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reprinted in the Appendix , at 1-5 (Appendix A) .

The order denying a timely-filed Petitioners' request for rehearing *en banc* is reprinted in the Appendix, at 6-7 (Appendix B).

Two memoranda of the United States District Court for the Second Circuit and a final judgment are reprinted as follows:

Memorandum Order 6/13/08, published in 561 F. Supp.2d 413), is reprinted in the Appendix, at 8-30 (Appendix C).

Final Judgment is reprinted in the Appendix, at 31-33 (Appendix D).

Memorandum Order 1/5/09 (denying Reconsideration) is reprinted in the Appendix, at 52-63 (Appendix H).

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit was entered on May 10, 2010. On May 24, 2010 Petitioner filed a timely request for panel rehearing and rehearing *en banc*. The petition for panel rehearing and rehearing *en banc* was denied by order dated July 6, 2010. This Petition for Certiorari is filed within 90 days of May 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Article III, § 1 provides, in pertinent part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

42 U.S.C. §12117 (ADA) provides, in pertinent part: "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the [EEOC], to the Attorney General, or to any person alleging discrimination on the basis of disability."

29 U.S.C. §626(d) (AEDA) provides, in pertinent part: "(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Rule 8(a) of FRCP sets out the plaintiff's requirements for a claim: a "short and plain statement" of jurisdiction, a "short and plain statement" of the claim, and a demand for judgment. It also allows relief in the alternative, so the plaintiff

does not have to pre-guess the remedy most likely to be accepted by the court.

The Rule 12(b)(6) motion, provides, in pertinent part: "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."

29 C.F.R. Part 1614 provides: "Prior to filing a civil action under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973, a federal sector complainant must first exhaust the administrative process set out at 29 C.F.R. Part 1614. "Exhaustion" for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court: (1) within 90 days of receipt of the final action where no administrative appeal has been filed; (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken; (3) within 90 days of receipt of EEOC's final decision on an appeal; or (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC. 29 C.F.R. Section 1614.408.

Under the Age Discrimination in Employment Act (ADEA), a complainant may proceed directly to federal court after giving the EEOC notice of intent

to sue. 29 C.F.R. Section 1614.201. An ADEA complainant who initiates the administrative process in 29 C.F.R. Part 1614 may also file a civil action within the time frames noted above. 29 C.F.R. Section 1614.408.

CPLR 103 (c) provides, in pertinent part: "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs."

Statement of the Case

This case presents a unique opportunity for the Court to establish standards relating to the general principles of "Exhaustion of Remedies" so that claimants who have an obligation to "exhaust remedies" under administrative statutes are treated equally and according to an equitable standard.

At present, exhaustion of remedies standards for discrimination or tort claims by public school teachers, such as the Petitioner, do not permit flexible application, amendment to claims or equitable interpretations when determining whether or not to permit civil claims in cases involving ongoing torts. There is disagreement between the Circuits on this issue.

Yet, exhaustion of remedies standards for discrimination or tort claims by prisoners enjoy flexible application, amendments to claims and equitable interpretations when determining whether or not to a prisoner's civil claims should be precluded due to alleged lack of exhaustion of remedies.

Petitioner prays that the Court consider the inequities, as well as the different and inequitable outcomes, that result from the lack of standards to govern all issues where "exhaustion of remedies" is raised as a procedural defense to a valid and timely claim involving ongoing allegations of discrimination and ongoing tort.

Also the disposition of this Petition affects hundreds of thousands, perhaps millions of union members and public employees. For that reason, Petitioner believes the Court should consider invited Amicus Curiae briefs from Teachers Unions and other Unions whose members' rights are affected by the issues presented herein.

A. Procedural History

For purposes of this petition, the petitioner will adopt the recitation of the procedural history as set forth in the opinion of the Second Circuit Court of Appeals:

Plaintiff Josefina Cruz, a former New York City schoolteacher, appeals *pro se* from the district court's denial of her Fed. R. Civ. P. 60(b) motion for relief from a judgment in favor of defendants, following a jury trial, on her employment discrimination and retaliation claims under the

Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112 et seq., the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., and 42 U.S.C. § 1983. See *Friedline v. N.Y. City Dep't of Educ.*, No. 06 Civ. 1836, 2009 WL 37828 (S.D.N.Y. Jan. 5, 2009).

B. Factual History

29 C.F.R. Part 1614 sets out the administrative process a federal sector complainant must first exhaust before filing a complaint alleging discrimination under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973. See *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir.1970).

The purpose of the exhaustion requirement "is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983); *see also Wu v. Thomas*, 863 F.2d 1543, 1548 (11th Cir.1989) ("The purpose of the filing requirement is to insure that the settlement of grievances be first attempted through the office of the EEOC.") (internal quotation and citation omitted).

In light of the purpose of the EEOC exhaustion requirement, courts have held that a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1332

(11th Cir.2000) (internal quotation and citation omitted); *Sanchez v. Standard Brands, Inc.*, 431 F.2d at 466 (noting that the allegations in a judicial complaint filed pursuant to Title VII may encompass any kind of discrimination like or related to the allegations contained in the charge). Courts are nonetheless "extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]." Id., at 460-61. As such, this Court has noted that "`the scope of an EEOC complaint should not be strictly interpreted'" *Id.* at 465 (citation omitted).

The regulations provide that an ADEA complainant who initiates the administrative process in 29 C.F.R. Part 1614 may also file a civil action within certain time frames (The time frame applicable to Petitioner's disability discrimination claim would be as follows: She could file a civil action after 180 days from the date of filing a complaint, if an administrative appeal had not been filed. 29C.F.R. Part 1614.408).

The Fourth Court has noted that judicial claims are allowed if they "amplify, clarify, or more clearly focus" the allegations in the EEOC complaint, but has cautioned that allegations of new acts of discrimination are inappropriate. *Wu*, 863 F.2d at 1547 (citation omitted).

However, under the liberal EEOC charge strictures of *Sanchez v. Standard Brands, Inc.* 431 F.2d 455, 460 (5th Cir.1970), a district court can extend the EEOC charge to encompass other claims of retaliation that are inextricably intertwined with other complaints.

Employees file EEOC complaints without the assistance of counsel, therefore, they are to be construed liberally. EEOC charge complaining of discharge was "reasonably related" to Title VII complaint that "she was discharged"). See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161-62 (5th Cir.1971).

Nevertheless, in order to prove retaliation under Title VII, a "plaintiff must show that (1) he/she engaged in statutorily protected activity, (2) an adverse employment causally related to the protected activity occurred, and (3) the adverse action was the plaintiff's protected activities." *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir.1997).

Petitioner had filed a disability and age discrimination complaint with the Equal Employment Opportunity Commission (hereinafter, EEOC) on March 27, 2006. Therefore, Petitioner's disability discrimination claims (which had started in February 2005 and were collateral to her age discrimination claims) were unexhausted prior to May 27, 2005, but became exhausted on that date.

> NOTE: In EEOC Form 161 (3/98), EEOC explains the expression not timely filed as follows: "You waited too long after the date(s) of the alleged discrimination to file your charge."

In their MOL in Support of Their Motion for Summary Judgment, defendants argue as follows: "A condition to bringing an action under the ADA and

the ADEA, is filing an administrative charge with the EEOC within 300 days of the alleged discriminatory acts." They also argued that "a court only has jurisdiction to hear DA and ADEA claims included in the EEOC charge or based on conduct alleged to have occurred subsequent to filing the EEOC charge that is 'reasonably related' to what was alleged in the EEOC charge."

In Petitioner's disability discrimination case, prior to the jury trial of her age discrimination claims and relying on *Griffith v. Gallagher*, 33 Fed. Appx. 15, 16 (2d Cir. 2002), cert. denied 537 U.S. 919 (2002); *Flaherty v. Metromail Corp.*, 235 F.3d 133, 136 n.1 (2d Cir. 2000); *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993); *Bent v. Mount Sinai Medical Ctr.*, 882 F. Supp. 353, 354 (SDNY 1995); and *Castellano v. City of New York*, 142 F.3d 58, 72 (2d Cir. 1998) (absent such a filing, Court lacks jurisdiction over plaintiff's claim), defendants filed a motion for summary judgment arguing that Cruz "had failed to file an EEOC Charge asserting the alleged discriminatory conduct. In her EEOC Charge, filed in March 2006, Cruz alleges that she was discriminated against on the basis of her age. Conspicuously absent from Cruz's EEOC filing is any reference to claims under the ADA or disability discrimination generally."

In her EEOC filing, Cruz asserted disability discrimination claims but EEOC only marked the space for age discrimination in the "charge of discrimination" portion of the EEOC template form had been marked, leaving the "disability discrimination" space blank. EEOC issued Petitioner a right to sue letter that resulted in her filing this

lawsuit for discriminatory conduct that was ongoing and continued after the jury trial of her age discrimination claims. The EEOC Charge alleged ongoing discrimination and retaliation based on allegations that plaintiff continued to suffer similar retaliation. The charge described the retaliatory behavior as ongoing, not merely past events.

"At the start of the *current school year*" ¶7. (Emphasis added).

"I agreed to withdraw my grievance in exchange for a promise that Principal Jerod Resnick would cease and desist from *assigning me these types of unfair schedules in the future*" ¶7 (Emphasis added).

"*To date, I still am assigned* to teach three consecutive periods" ¶7. (Emphasis added).

"*I am still awaiting* the rating regarding the December 5th [2005] lesson" ¶8 (Emphasis added).

"*It is my belief that I am* and have been a victim of discrimination based upon my age" ¶12. (Emphasis added).

Particularly important (and also on the record) is that while reassigned in the Regional Operation Center's (ROC's) rubber room (which defendants conceded was an adverse action), Petitioner's health worsened, and she developed life threatening diseases. Defendants engaged in discriminatory acts against Petitioner which started in February 2005 and continued for more than three years after Petitioner's disability claims became exhausted by filing the March 2006 charge (including refusing her accommodations pursuant to ADA, approved by their own Medical Office) a total of seven times. App. to

Pet. for Cert. at 65-66 and 67-68 (Appendices I and J).

The lawsuit alleged, *inter alia*, that Petitioner:

"[C]ontinued to have extreme difficulty standing and walking for extended periods";

"[W]as subjected to a discriminatory and retaliatory environment upon her return from her leave of absence in September 2004";

"[R]equested a reasonable accommodation";

Was assaulted by a student on November 21, 2005 but on November 29 the Principal substantiated against her a trumped charge that on November 14, she called this same student retarded (During the §3020-a hearing, the date of her alleged assault was darkened *in camera* to November 18, and the trial record reveals that the date was subsequently changed to November 21);

"[W]as given a U rating in June 2005" (Ullrich Aff. Exhibit 25 at 117 in App. to Pet. for Cert. at 11-12);

Two Assistant Principals observed her September 26, 2005 lesson, rated unsatisfactory by one although the other told Petitioner and other witnesses that her lesson was satisfactory;

Could not transfer to a neutral school.

Defendants did not dispute the above well- pleaded factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544. However, the District Court did not proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 556. The District Court did not include Cruz's allegations in the facts that, in his opinion were

"either undisputed or, where disputed and supported by competent evidence, taken most favorably to plaintiffs" which he considered pertinent to defendants' motion to dismiss. App. to Pet. for Cert. at 10-12.

In a pre-judgment order that was in direct conflict with the standard set by other circuits and rulings by this Court, the District Court, holding that a timely complaint with the EEOC was a "condition precedent to bringing a claim pursuant to the Americans with Disabilities Act" (Oral Argument, held on 9/5/2007) and that Petitioner had delayed four months (beyond the acceptable 300 days) to file her complaint, and also assuming that the delay had set off a "total exhaustion" rule of administrative remedy, dismissed with prejudice all of Petitioner's disability discrimination claims, unexhausted or not.

The District Court for the 2d Cir. modeled its judicially-created rule of total exhaustion applicable to EEOC disability claims after the "total exhaustion" rulings of the Sixth Circuit and other lower courts, in direct conflict with this Court's decision in *Jones v. Bock*, which held

> Procedural rules adopted by the Sixth Circuit and other lower courts, designed to implement the Prison Litigation Reform Act's (PLRA) exhaustion requirement and to facilitate early judicial screening, are not required by the PLRA, and crafting and imposing them exceeded the proper limits on the judicial role.

The District Court did not hold that Cruz's disability discrimination claims were

administratively barred due to EEOC's failure to mark the disability space on the EEOC template form. Petitioner contends that the District Court erred in ruling that she failed to exhaust her administrative remedies with regard to the disability discrimination claim. The exhaustion requirement was satisfied because the disability claim was based on the facts alleged in ¶¶ 2, 3, 4 and 7 of the EEOC charge. In *Weigel v. Baptist Hosp. of E. Tenn.*_(6th Cir. 7/15/02), the 6th Circuit held that "federal courts do not have subject matter jurisdiction to hear [ADEA] claims unless ... the claim can be reasonably expected to grow out of the EEOC charge." However, EEOC complaints filed by employees without the assistance of counsel are to be construed liberally. *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161-62 (5th Cir.1971). The facts alleged in Cruz's EEOC charge should have reasonably been extended to encompass a claim for disability discrimination because her age discrimination claims were so inextricably intertwined with her disability discrimination claims. Without the support of her disability discrimination claims and after certain rulings that limited her testimony to two hours and precluded the introduction of competent evidence (including a discovery cut-off whereby defendants did not produce Defendants' [unmarked] Exhibit YYY17, which they later used during cross examination), the age discrimination allegations did not go to the jury, the District Court asserted new claims for her from the bench after Discovery was over that, without evidence, were dismissed by granting defendants a Rule 50(a) motion. The jury returned a not liable verdict for the June 2005 age discrimination claim that did go to the jury without evidence. After judgment was entered, Cruz was also wrongfully

terminated and filed EEOC Charge No. 520-2009-04513.

In *Allen v. Highlands Hosp.*, (6th Cir. 10/21/08), the Sixth Circuit reversed court and held that "although administrative exhaustion is still a statutory prerequisite to maintaining claims brought under the ADEA, the prerequisite does not state a limitation on federal courts' subject matter jurisdiction over such claims." In other words, exhaustion is a statutory element of a plaintiff's discrimination claim, but not a jurisdictional requirement to filing suit.

The US Court of Appeals for the 4th Circuit has explained that it "is the inevitable corollary of our generally accepted principle that the scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission." *Nealon*, 958 F.2d at 590 (citing *Aronberg v. Walters*, 755 F.2d 1114, 1115 n.1 (4th Cir. 1985)).

Disregarding standard and uniformity in all courts, the active members of the U.S. Court of Appeals for the Second Circuit also ruled in conflict with this Court's opinion in *Jones v. Bock*, and held that Petitioner's disability claims had been "properly dismissed as unexhausted" by the District Court. The panel further held with the District Court that in her Notice of Appeal from the District Court's January 5, 2009 Order denying her Motion for Reconsideration, Petitioner, proceeding *pro se*, had renewed only two arguments raised in her Rule 60(b) Motion (in their opinion, the dismissal of Petitioner's

disability discrimination claim was not one of them). App. to Pet. for Cert. at 1-6, Appendix A. Departing from extant precedent, the Court of Appeals for the Second Circuit did not allow Petitioner's Notice of Appeal to reach challenges to the original judgment. See *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 121 (2d Cir. 2008); *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 65-66 (2d Cir. 2008).

The proper inquiry that the District Court and the active members of the Court of Appeals for the Second Circuit should have conducted was whether Cruz's disability complaint was like or related to, or grew out of, the allegations contained in her EEOC charge. Although not clear in the record, the EEOC presumably investigated her allegations, at least in some fashion. The record reveals that there was also competent evidence in the depositions defendants conducted on the issue.

Summary judgment was not appropriate because genuine issues of material fact existed regarding Petitioner's disability discrimination claims. The ruling by the District Court and the active members of the Court of Appeals for the Second Circuit is at odds with the decision of other circuits. *Jones v. Calvert Group, Ltd.*, No. 07-1680 (4th Cir. Jan. 5, 2009); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992) (citing *Aronberg v. Walters*, 755 F.2d 1114, 1115 n.1 (4th Cir. 1985)); *Wedow v. City of Kansas City , Mo.* , 442 F.3d 661, 673-75 (8th Cir. 2006) (holding that EEOC charge served to exhaust retaliation claims arising after the charge was filed when charge alleged ongoing retaliatory denial of work opportunities and opportunities for promotion and post-charge claims were based on allegations that plaintiff continued to suffer similar retaliatory

denials); *Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003) (holding that after *Morgan* claims of discrete employment actions are not exhausted by virtue of earlier EEOC charge even when the claim is reasonably related to the EEOC charge); and *Clockedile*, 245 F.3d at 5-6.

The critical question and controlling issue in this Petition for Certiorari is whether summary judgment should have been entered for the defendant employer on Cruz's disability discrimination claim in the charge that was properly before the District Court and Court of Appeals for the Second Circuit, on the ground that the claim was properly dismissed as unexhausted.

Even if the nature of the retaliation alleged by Petitioner is slightly different from the retaliation alleged in relevant cases, the 4th Cir. sees no reason why the discrimination particular to each case should make any difference when the problem relates to EEOC filing. *Jones v. Calvert Group, Ltd.* No. 07-1680 (4th Cir. Jan. 5, 2009). Notably, even exhaustion of remedies standards for discrimination or tort claims by prisoners enjoy more flexible application. See *Jones v. Bock* (No. 05-7058, Cert. Granted: March 6, 2006).

The District Court had also held from the bench that all plaintiffs satisfied the fourth prong of a *prima facie* case of age discrimination because, collectively, they had introduced more than sufficient evidence to create an inference of discrimination (App. to Pet. for Cert. at 28), and that a reasonable juror could find that defendants' adverse actions were motivated, at least in part, by age discrimination" (Id. at 33). Furthermore, when

defendants injected into this federal case New York State §3020-a charges (lodged against Petitioner after she became part of this lawsuit), and adduced so-called legitimate, non-discriminatory reasons purported to prove their adverse actions were not pretextual, from the bench the Court held twice that, based on Petitioner's June 2005 and 2006 U ratings and her transfer to ROC's rubber room, she had also made out a *prima facie* case of ADEA and §1983 on the merits. Ibid. at 30 and 33.

Defendants did not dispute the allegations in the lawsuit (*supra*), but the District Court did not assume the veracity of the allegations or, to determine whether they plausibly gave rise to an entitlement to relief, include them in the facts that in the District Court's opinion were "either undisputed or, where disputed and supported by competent evidence, taken most favorably to plaintiffs," which he considered pertinent to defendants' motion to dismiss. App. to Pet. for Cert. at 10-12.

Summary judgment was not appropriate because genuine issues of material fact existed regarding Petitioner's age discrimination claims.

Without dismissing those allegations, the District Court's pre-trial order held Petitioner's complaint was as follows:

"Plaintiff Cruz complains of adverse actions in being given U ratings in June 2005 and June 2006 and in being transferred to the Regional Operation Center." Id. at 24.

This court reversal occurred a year after Discovery had been produced (including a 6/15/07 discovery cut-off that allowed an in-trial discovery violation), and depositions had been conducted. For this new complaint Petitioner did not file (except as pertains to the June 2005 U rating), no Discovery was ever produced nor Examinations before Trial conducted.

Rule 8 of FRCP 1 governs the pleading standard in all civil actions. See *Bell Atlantic Corp. v. Twombly*, 550 U.S., at 555-556 and n. 14 P. 20. We are also mindful that one of the most obvious limitations imposed by Article III, Section 1 of the Constitution is that judicial action must be governed by *standard*, by *rule*. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

Under Federal Rule of Civil Procedure 8(a) (2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required (*Bell Atlantic Corp. v. Twombly*, 550 U. S., at 555), but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id., at 570. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged". Id., at 556. When the District Court held that Petitioner had made ADEA and §1983 claims on the merits (premised on her June 2005 and 2006 U ratings and transfer to ROC's rubber room), the reviewing court had drawn the reasonable inference that the defendants were liable for the adverse actions, based on its experience and

common sense, and no allegations were required. *Bell Atlantic Corp. v. Twombly*, 550 U. S., at 556.

Notably for no apparent reason, the District Court's holding that Petitioner had made ADEA and §1983 claims on the merits caused the pretermission of the other allegations in Petitioner's pleading which the District Court had previously held to be adequate, but at this point dismissed without deciding. App. to Pet. for Cert. at 33.

Inasmuch as the District Court's holding that Petitioner had made ADEA and §1983 claims on the merits conflated the other allegations in her pleading, he abused his discretion, and this conflation marks a serious departure from the purpose of judicial supervision. To any reasonable person, it should be apparent that the District Court's holding also conflicted with the standards set in all circuits and the opinions of this Court.

Regardless, the District Court's holding and order abridged and/or denied petitioner's due process rights without deciding, which cannot be sustained on constitutional grounds. It is well established that District Courts cannot *sua sponte* dismiss well-pleaded factual allegations without deciding, especially allegations held to be adequate. The abuse of discretion created countless problems and confusion that prevented the proper determination on the merits as well as post-trial motions.

Not only were Petitioner's well-pleaded factual allegations, previously held to be adequate, dismissed without deciding and/or replaced by the court-ordered ADEA and §1983 age discrimination

claims premised on her June 2005 and 2006 U ratings and transfer to the ROC's rubber room a year after discovery and depositions were over, but also, because there had been no Discovery produced and no Examination before Trial conducted for these new claims, no testimonial or documentary evidence could be introduced for Petitioner's defense at trial. Thus, the District Court's conclusion that the in-trial evidence precluded a jury verdict in Petitioner's favor and subsequent ruling granting defendants a Rule 50(a) Motion, is flawed and contradictory.

The District Court decided the facts and the law, including the Rule 50 (a) Motion, without the required evidence it had ruled to suppress. The District Court erred by granting defendants' Fed. R. Civ. P. 50(a) motion for judgment as a matter of law with respect to Petitioner's age discrimination claims. Although determining this mismanagement was a task well within an appellate court's core competency (*Bell Atlantic Corp. v. Twombly*, 550 U.S. at 557), the active members of the U.S. Court of Appeals for the Second Circuit ruled there was no abuse of discretion in the ruling.

Notably, other rulings by the District Court also precluded the introduction of any in-trial evidence.

Reasons Why Certiorari Should Be Granted

I. Review is Warranted to Establish a Standard to be Applied throughout the Circuits for Exhaustion of Remedy Cases involving Hearings in cases arising from Federal Administrative Statutes and Hearings.

II. Review Is Warranted Because the Opinion By The Majority Panel of the Second Circuit Conflicts With This Court's Holding in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544; *Jones v. Bock* (No. 05-7058, Cert. Granted: March 6, 2006); *Jones v. Calvert Group, Ltd.*, No. 07-1680 (4th Cir. Jan. 5, 2009); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

III. Review Is Warranted Because the Opinion By The Majority Panel of the Second Circuit Conflicts With The Opinion Of Other Circuits in *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1332 (11th Cir.2000); *Allen v. Highlands Hosp.*, (6th Cir. 10/21/08); *Aronberg v. Walters*, 755 F.2d 1114, 1115 n.1 (4th Cir. 1985)); *Clockedile*, 245 F.3d at 5-6; *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 161-62 (5th Cir.1971); *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983); *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir.1997); *Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992); *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 121 (2d Cir. 2008); *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 65-66 (2d Cir.

2008); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir.1970); *Wedow v. City of Kansas City , Mo.* , 442 F.3d 661, 673-75 (8th Cir. 2006); and *Wu v. Thomas*, 863 F.2d 1543, 1548 (11th Cir.1989).

IV. Review Is Warranted Because It Probably Affects Millions of People and Will Promote Uniformity In The Circuits Related To Issues Of Exhaustion Of Remedies.

Conclusion

For the reasons stated above, the writ should be granted and the case set down for argument.

Respectfully submitted,

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Pro Se

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